

MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

IIRIRA transformed motions to reopen from a regulatory to a statutory form of relief. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005). For individuals in removal proceedings, motions to reopen and to reconsider are governed by 8 U.S.C. § 1229a(c)(6) and (7) (formerly codified at 8 U.S.C. § 1229a(c)(5) and (6)). For deportation cases pending before the April 1, 1997 effective date of IIRIRA, motions to reopen or to reconsider are governed by 8 C.F.R. §§ 1003.2 and 1003.23(b) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND TO RECONSIDER

A. Motion to Reopen

A motion to reopen is based on factual grounds, and seeks a fresh determination based on newly discovered facts or a change in the applicant's circumstances since the time of the hearing. *See* 8 U.S.C. § 1229a(c)(7)(B) (removal proceedings); 8 C.F.R. § 1003.2(c). A petitioner may also move to reopen to apply for discretionary relief. *See* 8 C.F.R. § 1003.2(c); *Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1180 (9th Cir. 2001) (en banc); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (providing history of motion to reopen mechanism).

B. Motion to Reconsider

A motion to reconsider is based on legal grounds, and seeks a new determination based on alleged errors of fact or law. *See* 8 U.S.C. § 1229a(c)(6) (removal proceedings); 8 C.F.R. § 1003.2(b)(1); *see also Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004). The motion to reconsider must be accompanied by a statement of reasons and supported by pertinent authority. *See* 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2(b)(1); *see also Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003).

C. Motion to Remand

A motion to reopen or reconsider filed while an immigration judge's deportation or removal decision is before the BIA on direct appeal will be treated as a motion to remand the proceedings to the immigration judge. *See Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097 (9th Cir. 2005); 8 C.F.R. § 1003.2(b)(1) and (c)(4). "The formal requirements of the motion to reopen and those of the motion to remand are for all practical purposes the same." *Rodriguez*, 841 F.2d at 867; *cf. Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (holding that a motion to remand filed after petitioner's deportation order had become final, was properly treated as a motion to reopen); *see also Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (holding that the BIA must address and rule on substantive remand motions); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097 (9th Cir. 2005) (holding that the BIA must articulate its reasons for denying a motion to remand).

D. Improperly Styled Motions

Where a petitioner improperly titles a motion to reopen or to reconsider, the BIA should construe the motion based on its underlying purpose. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (noting that the BIA properly construed "motion to reconsider" based on ineffective assistance of counsel as a motion to reopen, and that petitioner's subsequent "motion to reopen" should have been construed as a motion to reconsider the BIA's previous decision).

II. JURISDICTION

The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321–22 (9th Cir. 1997) (concluding "that other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *Azarte v. Ashcroft*, 394 F.3d 1278, 1281 (9th Cir. 2005). "[T]he BIA's denial of a motion to reconsider is a separate action that must be separately appealed for this court to have jurisdiction." *Andia v. Ashcroft*, 359 F.3d 1181, 1183 n.3 (9th Cir. 2004)

(per curiam).

The court is currently considering whether it has jurisdiction to review the agency's decision with respect to a motion to reopen and/or a motion to reconsider that effectively challenges the agency's discretionary denial of relief over which this court generally lacks jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(i). *See, e.g., Valencia Bravo v. Gonzales*, 02-72497 (arg. & sub. 9/13/05 - motion to reconsider); *Fernandez v. Gonzales*, 02-72733 (arg. & sub. 9/13/05 - motion to reopen); *Tesfamariam v. Ashcroft*, 03-72489 (arg. & sub. 9/13/05).

Cross-Reference: Jurisdiction Over Immigration Petitions,
Jurisdiction Over Motions to Reopen

A. Finality of the Underlying Order

The filing of a motion to reopen does not disturb the finality of the underlying deportation or removal order. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). However, if the BIA grants a motion to reopen, "there is no longer a final decision to review," and the petition should be dismissed for lack of jurisdiction. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order); *see also Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order) (advising parties to notify the court when the BIA grants a motion to reopen while a petition for review is pending).

This court may review the denial of a motion to reopen even if a motion to reconsider is pending before the BIA. *Singh v. INS*, 213 F.3d 1050, 1052, n.2 (9th Cir. 2000).

B. Filing Motion To Reopen or Reconsider Not a Jurisdictional Prerequisite to Filing a Petition for Review

The filing of a motion to reopen or reconsider with the BIA is not a jurisdictional prerequisite to filing a petition for review with the court of appeals. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1023–24 (9th Cir. 1992).

C. No Tolling of the Time Period to File Petition for Review

The time period for filing a petition for review with the court of appeals is not tolled by the filing of a motion to reopen. *See Stone v. INS*, 514 U.S. 386, 405–06 (1995); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996).

D. No Automatic Stay of Deportation or Removal

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal. *See* 8 C.F.R. § 1003.2(f); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999).

1. Exception for In Absentia Removal or Deportation

The filing of a motion to reopen an in absentia order of deportation or removal stays deportation. *See* 8 C.F.R. § 1003.2(f).

E. Consolidation

Judicial review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal. *See* 8 U.S.C. § 1252(b)(6).

F. Departure from the United States

Departure from the United States generally ends the right to make a motion to reopen or reconsider. *See* 8 C.F.R. § 1003.2(d); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (holding that § 1003.2(d) applies only to persons who depart the U.S. after removal proceedings have already commenced against them). However, a motion to reopen may be made on the basis that the departure was not legally executed. *See Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings where his state conviction, which was the sole ground of deportation, was vacated); *Estrada-Rosales v. INS*, 645 F.2d 819, 820–21 (9th Cir. 1981); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977).

Cross-reference: Jurisdiction Over Immigration Petitions in the Ninth Circuit, Departure from the United States, Review of Motions to Reopen.

III. STANDARD OF REVIEW

A. Generally

The court reviews denials of motions to reopen or reconsider for abuse of discretion. *See Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), *amended by* 404 F.3d 1105 (2005). The abuse of discretion standard applies regardless of the underlying relief requested. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). “[M]otions to reopen are disfavored in deportation proceedings.” *INS v. Abudu*, 485 U.S. 94, 107, 110 (1988) (noting, among other things, “the tenor of the Attorney General’s regulations, which plainly disfavor motions to reopen”). However, this court will reverse the denial of a motion to reopen if it is “arbitrary, irrational, or contrary to law.” *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2002) (internal quotation marks omitted); *Mohammed v. Gonzales*, 400 F.3d 785, 791-92 (9th Cir. 2005).

The BIA’s determination of purely legal questions is reviewed de novo. *See Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000). Factual findings are reviewed for substantial evidence. *See Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996).

Cross-reference: Jurisdiction Over Immigration Petitions, Standards of Review; Ninth Circuit Standards of Review Outline.

B. Full Consideration of All Factors

The BIA must show proper consideration of all factors, both favorable and unfavorable. *See, e.g., Bhasin v. Gonzales*, No. 03-73481, 2005 WL 2100447, at *7 (9th Cir. Sept. 1, 2005) (holding that the BIA abused its discretion by improperly discrediting petitioner’s affidavit as “self-serving” and failing to properly consider the factors relevant to eligibility for relief); *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) (holding that BIA abused its discretion by denying motion to reopen in an incomplete and nonsensical opinion, and in failing to consider all attached evidence); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA’s unexplained failure to address petitioner’s ineffective assistance of counsel claim); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097-99 (9th Cir.

2005) (remanding motion to reopen or remand based on new evidence pertaining to asylum application where the BIA failed to articulate its reasons for denying motion to reopen); *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where the BIA did not consider any of the factors weighing in petitioner's favor); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen to apply for suspension where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998); *Watkins v. INS*, 63 F.3d 844, 848 (9th Cir. 1995).

1. Later-Acquired Equities

It is unclear whether equities acquired after a final order of deportation or removal must be given less weight than those acquired before the applicant was found to be deportable. *Compare Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) ("The government rightly points out that equities flowing from [petitioner's] marriage should be given little weight because it took place . . . three months after the BIA's summary dismissal/final deportation order."), *and Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) (affirming denial of motion to reopen because petitioner's intra-proceedings marriage did not outweigh his violations of immigration law), *with Israel v. INS*, 785 F.2d 738, 741 (9th Cir. 1986) (concluding that the BIA's denial of a motion to reopen to adjust status based on a "last-minute marriage" was arbitrary); *see also Malhi v. INS*, 336 F.3d 989, 994 (9th Cir. 2003) (discussing regulatory presumption of fraud for intra-proceedings marriages and requirements of bona fide marriage exemption).

C. Explanation of Reasons

"We have long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (granting petition where BIA summarily denied motion to reopen and remand without explanation). "[W]here the BIA entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision to review." *Id.* (rejecting government's contention that the BIA's summary denial of a motion to reopen and remand was consistent with the BIA's streamlining procedures).

See also Mohammed v. Gonzales, 400 F.3d 785, 792 (9th Cir. 2005) (“[T]he BIA must issue a decision that fully explains the reasons for denying a motion to reopen.”); *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (holding that “the BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial”); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998) (“[T]he BIA must indicate how it weighed [the favorable and unfavorable] factors and indicate with specificity that it heard and considered petitioner’s claims.”).

D. Irrelevant Factors

The BIA may not rely on irrelevant factors. *See, e.g., Virk v. INS*, 295 F.3d 1055, 1060–61 (9th Cir. 2002) (holding that the BIA improperly considered the impact of an unrelated section of the INA and petitioner’s wife’s pre-naturalization misconduct); *Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (holding that the BIA improperly relied on misconduct of petitioner’s father).

E. Credibility Determinations

The BIA should not make credibility determinations on motions to reopen. *See Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) (“As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings.”). Facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. *See Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *see also Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003) (“The BIA violates an alien’s due process rights when it makes a sua sponte adverse credibility determination without giving the alien an opportunity to explain alleged inconsistencies.”); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897 (9th Cir.) (holding that where the BIA cites no evidence to support a finding that petitioner’s version of the facts is incredible, and none is apparent from the court’s review of the record, petitioner’s allegations will be credited), *amended by* 339 F.3d 1012 (2003).

IV. REQUIREMENTS FOR A MOTION TO REOPEN

A. Supporting Documentation

A motion to reopen must be supported by affidavits, the new evidentiary material sought to be introduced, and, if necessary, a completed application for relief. *See* 8 U.S.C. § 1229a(c)(7)(B) (removal proceedings); 8 C.F.R. § 1003.2(c)(1) (pre-IIRIRA proceedings); *see also INS v. Wang*, 450 U.S. 139, 143 (1981) (per curiam) (upholding BIA’s denial of motion to reopen to apply for suspension because “the allegations of hardship were in the main conclusory and unsupported by affidavit.”); *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) (“[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material.”). “Although the statute and regulation refer to ‘affidavits,’ we have treated affidavits and declarations interchangeably for purposes of motions to reopen.” *Malty v. Ashcroft*, 381 F.3d 942, 947 n.2 (9th Cir. 2004).

1. Exception

The petitioner’s failure to submit supporting documentation does not bar reopening where the government either joins in the motion to reopen, or does not affirmatively oppose it. *See Konstantinova v. INS*, 195 F.3d 528, 530–31 (9th Cir. 1999) (noting that the BIA retains the ability to waive procedural errors); *Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) (per curiam); *see also Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 381 (9th Cir.) (en banc) (assuming that where the BIA does not express concerns about form, relevancy or admissibility of the new evidence, “that any purported failure to comply with procedural requirements was not the stated reason for the BIA’s” decision), *amended by* 320 F.3d 858 (2003).

B. Previously Unavailable Evidence

The moving party must show that the new material evidence could not have been discovered and presented at the former hearing. *See INS v. Doherty*, 502 U.S. 314, 324 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence); *Bhasin v. Gonzales*, No. 03-73481, 2005 WL 2100447, at *7 (9th Cir. Sept. 1, 2005) (explaining that the statutes and regulations require that the evidence must not have been available to be presented at the former hearing before the IJ);

Guzman v. INS, 318 F.3d 911, 913 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because “new” information was available and capable of discovery prior to deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279, 1282 (9th Cir. 1998) (finding no evidence of new circumstances to support asylum application); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (holding that the BIA erred in affirming the IJ’s decision granting the government’s motion to reopen based on a foreign birth certificate that could have been discovered and presented at prior hearing).

C. Explanation for Failure to Apply for Discretionary Relief

If the motion to reopen is made for the purpose of obtaining discretionary relief, the moving party must establish that he or she was denied the opportunity to apply for such relief, or that such relief was not available at the time of the original hearing. *See INS v. Doherty*, 502 U.S. 314, 327 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding because the applicant did “not reasonably explain[] his failure to pursue his asylum claim at the first hearing”); *INS v. Abudu*, 485 U.S. 94, 111 (1988) (affirming BIA’s denial of motion to reopen to apply for asylum where applicant failed to explain why the asylum application was not submitted earlier); *Lainez-Ortiz v. INS*, 96 F.3d 393, 396 (9th Cir. 1996).

D. Prima Facie Eligibility for Relief

The applicant must also show prima facie eligibility for the underlying substantive relief requested. *See INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 869 (9th Cir. 2003) (finding request to reinstate asylum application analogous to motion to reopen); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 375 (9th Cir.) (en banc), *amended by* 320 F.3d 858 (2003); *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir. 1994); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *Aviles-Torres v. INS*, 790 F.2d 1433, 1435–36 (9th Cir. 1986).

“A *prima facie* case is established when an alien presents affidavits or other evidentiary material, which, if true, would satisfy the requirements for substantive relief.” *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir.

1985) (internal quotation marks and citation omitted). “The movant . . . need not conclusively establish that he warrants relief.” *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003).

E. Discretionary Denial

Where ultimate relief is discretionary, such as asylum, the BIA may leap over the threshold concerns, and determine that the moving party would not be entitled to the discretionary grant of relief. *See, e.g., INS v. Abudu*, 485 U.S. 94, 105–06 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997); *Vasquez v. INS*, 767 F.2d 598, 600 (9th Cir. 1985); *see also* 8 C.F.R. § 1003.2(a) (“The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.”)

However, “the BIA must consider and weigh the favorable and unfavorable factors in determining whether to deny a motion to reopen proceedings on discretionary grounds.” *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where the BIA did not consider any of the factors weighing in petitioner’s favor); *Arrozal v. INS*, 159 F.3d 429, 433–34 (9th Cir. 1998).

F. Failure to Voluntarily Depart

Under the permanent rules, a petitioner’s failure to depart from the United States during her voluntary departure period will not support a denial of a motion to reopen, as long as the petitioner filed the motion to reopen and a request for a stay of removal within the voluntary departure period. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (holding that petitioner’s voluntary departure period is tolled while the BIA considers a timely-filed motion to reopen); *cf. Medina-Morales v. Ashcroft*, 371 F.3d 520, 529–531 & n.9 (9th Cir. 2004) (holding, in permanent rules case, that where a petitioner bargains for voluntary departure in lieu of full adjudication under 8 U.S.C. § 1229c(a)(1), the BIA may weigh petitioner’s voluntary departure agreement against the grant of a motion to reopen). In *Azarte*, the court did not reach the issue of whether filing a motion to reopen automatically tolls the voluntary departure period.

If the petitioner files a motion to reopen after the expiration of the voluntary departure period, the BIA may deny the motion to reopen based on petitioner's failure to depart. *See De Martinez v. Ashcroft*, 374 F.3d 759, 763–64 (9th Cir. 2004) (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period).

Under the transitional rules, the BIA may deny a motion to reopen to apply for relief where the petitioners failed to depart during the voluntary departure period. *See Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998); *cf. Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (holding in transitional rules case that the BIA erred in denying motion to reopen to apply for suspension where the IJ failed to give adequate oral warning of the consequences of failing to voluntarily depart).

Cross-reference: Cancellation of Removal, Ten-Year Bars to Cancellation, Failure to Depart.

G. Appeal of Deportation Order

“The BIA cannot deny a motion to reopen merely because an alien appeals a deportation order.” *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531 n.10 (9th Cir. 2004) (citing *Watkins v. INS*, 63 F.3d 844, 851 (9th Cir. 1995)).

H. Fugitive Disentitlement Doctrine

Individuals who “disregard the order of deportation against them by refusing to report on their appointed date of departure may have their motion to reopen denied as a matter of discretion.” *Bhasin v. Gonzales*, No. 03-73481, 2005 WL 2100447, at *7 (9th Cir. Sept. 1, 2005) (declining to uphold the BIA's reliance on the fugitive disentitlement doctrine in denying petitioner's motion to reopen because petitioner failed to receive critical documents); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091 (9th Cir. 2003) (applying the fugitive disentitlement doctrine where petitioner had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *see also Matter of Barocio*, 19 I. & N. Dec. 255 (BIA 1985) (internal quotation marks omitted).

V. TIME AND NUMERICAL LIMITATIONS

A. Generally

1. Time Limitations

Generally, a motion to reopen must be filed within ninety days after a final decision is rendered. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) (removal proceedings); 8 C.F.R. § 1003.2(c)(2) (pre-IIRIRA proceedings); *see also* *Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (discussing first imposition of time limitation on motions to reopen in 1990).

A motion to reconsider must be filed within thirty days after the date of entry of the final decision. *See* 8 U.S.C. § 1229a(c)(6)(B) (removal proceedings); 8 C.F.R. § 1003.2(b)(2) (pre-IIRIRA proceedings).

The limitation period begins to run when the BIA sends its decision to the correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258–59 (9th Cir. 1996).

2. Numerical Limitations

A party may make one motion to reopen and one motion to reconsider. *See* 8 U.S.C. § 1229a(c)(7)(A) and (c)(6)(A) (removal proceedings); 8 C.F.R. § 1003.2(b)(2) and (c)(2). The single-motion limitation on motions to reopen does not apply to motions to reopen and rescind in absentia orders of deportation. *See Fajardo v. INS*, 300 F.3d 1018, 1020 (9th Cir. 2002) (noting that the limitation applies only to removal cases under IIRIRA’s permanent rules).

B. Exceptions to the Ninety-Day/One-Motion Rule

1. In Absentia Orders

a. Exceptional Circumstances

If an applicant who is ordered deported or removed in absentia can

show that she failed to appear for the hearing due to “exceptional circumstances,” the applicant has 180 days to file a motion to reopen to rescind the in absentia order. *See* 8 U.S.C. § 1229a(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(1); *see also* *Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003).

“The term ‘exceptional circumstances’ refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.” 8 U.S.C. § 1229a(e)(1); *see also* *Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004). “This court must look to the particularized facts presented in each case in determining whether the petitioner has established exceptional circumstances.” *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (internal quotation marks omitted); *see also* 8 U.S.C. § 1252b(f)(2) (pre-IIRIRA provision, repealed 1996).

(i) Evidentiary Requirements

The BIA may not impose new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050, 1053–54 (9th Cir. 2000) (holding that the BIA violated due process where it required an applicant to produce an affidavit from his employer or doctor, and to immediately contact the immigration court); *cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of the BIA’s evidentiary requirements).

(ii) Cases Finding Exceptional Circumstances

Chete Juarez v. Ashcroft, 376 F.3d 944, 948 (9th Cir. 2004) (holding that petitioner established exceptional circumstances because she appeared at all scheduled hearings but the last, of which she had no actual notice, she had prevailed on appeal before the BIA, and had no reason to delay or evade the hearing); *Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004) (stating that ineffective assistance of counsel qualifies as an exceptional circumstance, but denying relief because petitioner failed to comply with the procedural prerequisites of *Matter of Lozada*); *Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003) (holding that ineffective assistance of counsel constituted an exceptional circumstance); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 894–95, 898 (9th Cir.) (counsel’s wife’s advice to leave and reenter the

United States the day before the hearing, in order to prove that petitioner's visa was valid, constituted IAC and exceptional circumstances), *amended by* 339 F.3d 1012 (2003); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (suggesting to BIA on remand that "it [would be] difficult to imagine" how the paralegal's failure to inform the petitioner "of her need to appear at her deportation hearing would not constitute an exceptional circumstance"); *Singh v. INS*, 295 F.3d 1037, 1039–40 (9th Cir. 2002) (holding that petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding, and had "no possible reason to try to delay the hearing" because he was eligible for adjustment of status); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999) (concluding that where applicant was 20 minutes late, and the IJ was still on the bench, an in absentia order was too "harsh and unrealistic"); *see also Romani v. INS*, 146 F.3d 737, 739 (9th Cir. 1998) (holding that where applicants were in the courthouse but did not enter the courtroom due to incorrect advice by lawyer's assistant, they did not fail to appear for their hearing, and reopening was warranted).

(iii) Cases Finding No Exceptional Circumstances

Valencia-Fragoso v. INS, 321 F.3d 1204, 1205 (9th Cir. 2003) (per curiam) (holding that applicant who was 4 1/2 hours late, based on a misunderstanding of the time of the hearing, did not establish exceptional circumstances, especially where only possible relief was discretionary grant of voluntary departure); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891–92 (9th Cir. 2002) (severe asthma attack not exceptional); *Singh-Bhathal v. INS*, 170 F.3d 943, 946–47 (9th Cir. 1999) (holding that erroneous advice of immigration consultant to not appear at hearing did not constitute exceptional circumstances); *Shaar v. INS*, 141 F.3d 953, 958 (9th Cir. 1998) (holding that the mere filing of a motion to reopen did not constitute exceptional circumstances excusing petitioners' failure to voluntarily depart by the deadline); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that applicant's failure to actually and personally receive the notice of hearing, which was mailed to his last known address, where receipt was

acknowledged, was not an exceptional circumstance); *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (traffic congestion and parking difficulties not exceptional); *see also Hernandez-Vivas v. INS*, 23 F.3d 1557, 1559–60 (9th Cir. 1994) (holding under the previous standard that the mere filing of a motion for a change of venue did not establish reasonable cause for failure to appear).

b. Improper Notice of Hearing

A motion to reopen to rescind an in absentia order of removal may be filed at any time if the applicant demonstrates improper notice of the hearing. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2). “Neither the statute nor the BIA’s interpretation of the statute—or any court of appeals opinion—limits this ‘any time’ language by prescribing a cut-off period after an alien learns of the deportation order.” *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. *See Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004). If petitioners do not receive actual or constructive notice of deportation proceedings, “it would be a violation of their rights under the Fifth Amendment of the Constitution to deport them in absentia.” *Andia v. Ashcroft*, 359 F.3d 1181, 1185 (9th Cir. 2004) (per curiam).

A petitioner “does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied.” *Farhoud*, 122 F.3d at 796 (holding that notice was sufficient where mailed to applicant’s last address, where receipt was acknowledged); *see also Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002). “Actual notice is, however, sufficient to meet due process requirements.” *Khan*, 374 F.3d at 828 (holding that a second notice in English was sufficient to advise petitioner of the pendency of the action when petitioner had appeared in response to an earlier notice in English).

(i) Proper Notice Requirements

(A) Removal Proceedings

Proper notice procedures for removal proceedings are set forth in 8 U.S.C. § 1229(a)(1) and (2). The statute provides that “written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any).” *Id.*; *see also Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004). “In addition, the notice must include seven specified elements, including, *inter alia*, the nature of the proceedings, the conduct that is alleged to be in violation of the law, and the date and time of the proceedings.” *Khan*, 374 F.3d at 828. Neither the statute nor the regulations require notices to be provided in any language other than English. *See id.* (distinguishing translation requirement for expedited removal proceedings).

(B) Pre-IIRIRA Proceedings

Before IIRIRA, the adequate notice provision required, *inter alia*, service of the order to show cause in person or by certified mail, and an OSC written in English and Spanish. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 (9th Cir. 2004); 8 U.S.C. § 1252b(a) (repealed 1996).

(ii) Presumption of Proper Notice

The INS will benefit from a presumption of effective delivery if the notice of hearing was properly addressed; had sufficient postage; and was properly deposited in the mails. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003). However, “[a] notice which fails to include a proper zip code is not properly addressed.” *Id.* “Notice mailed to an address different from the one [the applicant] provided could not have conceivably been reasonably calculated to reach him.” *Singh v. INS*, 362 F.3d 1164, 1169 (9th Cir. 2004).

The applicant is responsible for informing the immigration agency of

his current address. *See* 8 U.S.C. § 1305(a); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1121-22 (9th Cir. 2005) (explaining that § 1305(a) applies only so long as the applicant is within the United States and where he or she receives written notice of the address notification requirement); *Lahmidi v. INS*, 149 F.3d 1011, 1017 (9th Cir. 1998) (holding, under the pre-1992 statutory provision, that applicant who was not informed of the change-of-address requirement established reasonable cause for failure to appear at the hearing); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (same).

Where an applicant seeks to reopen proceedings on the basis of nondelivery or improper delivery of the notice, the IJ and BIA must consider the evidence submitted by the applicant. *See Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam).

(iii) Notice by Certified Mail

Notice sent by certified mail is entitled to a stronger presumption of effective delivery. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003); *see also Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (per curiam) (concluding that “notice by certified mail sent to an alien’s last known address can be sufficient under the Act, even if no one signed for it”). This court has not addressed whether the presumption of delivery is rebutted where the INS lacks the certified return receipt. *See Busquets-Ivars*, 333 F.3d at 1009 (expressing “no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective”); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1119 n.1 (9th Cir. 2005) (noting that the government did not submit into evidence the certified mailing return receipt).

In the case of notice delivered by certified mail, an applicant may rebut the presumption of effective service if “her mailing address has remained unchanged, that neither she nor a responsible party working or residing at that address refused service, and that there was nondelivery or improper delivery by the Postal Service.” *Arrieta v. INS*, 117 F.3d 429, 432

(9th Cir. 1997) (per curiam).

(iv) Notice by Regular Mail

“[D]elivery by regular mail does not raise the same ‘strong presumption’ as certified mail, and less should be required to rebut such a presumption.” *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (holding, under the new statutory provision in 8 U.S.C. § 1229(a)(1), which does not require service by certified mail, that the BIA erred by applying the strong presumption of delivery accorded to certified mail under the former statutory provision). An applicant’s sworn affidavit that neither she nor a responsible party residing at her address received the notice “should ordinarily be sufficient to rebut the presumption of delivery and entitle [the applicant] to an evidentiary hearing.” *Id.* (noting that the applicant initiated the proceedings to obtain a benefit, appeared at an earlier hearing, and had no motive to avoid the hearing); *see also Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (“To overcome the presumption of adequate notice when notice of a deportation hearing was sent by a constitutionally adequate method, Urbina must present[] substantial and probative evidence . . . demonstrating that there was improper delivery or that nondelivery was not due to the respondent’s failure to provide an address where [s]he could receive mail.”) (internal quotation marks omitted).

(v) Notice to Counsel Sufficient

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208, 1209 (9th Cir. 2000) (per curiam) (rejecting claim of inadequate notice where the government personally served written notice of the hearing on applicant’s counsel; noting that applicant did not raise an ineffective assistance of counsel claim). Where the government fails to send notice to counsel of record, notice is insufficient. *See Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002).

(vi) Notice to Juvenile Insufficient

If a juvenile under 18 years old is released from INS custody to a responsible adult, proper written notice must be served on the juvenile and on the adult who took custody of him. *See Flores-Chavez v. Ashcroft*, 362

F.3d 1150, 1163 (9th Cir. 2004).

**(vii) Notice to Applicant No Longer Residing
in the United States**

A notice to appear mailed to an applicant's former address after he has already departed the United States may not be sufficient to establish proper notice. *See Singh v. Gonzales*, 412 F.3d 1117, 1121-22 (9th Cir. 2005) (holding that BIA abused its discretion in denying a motion to reopen where applicant submitted evidence demonstrating that the agency mailed notice to his former address after he had already departed the United States).

2. Asylum and Withholding Claims

A motion to reopen to apply or reapply for asylum or withholding of removal based on changed country conditions that could not have been discovered or presented at the prior hearing, may be filed at any time. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (removal proceedings); 8 C.F.R. § 1003.2(c)(3)(ii) (pre-IIRIRA proceedings); *see also Maly v. Ashcroft*, 381 F.3d 942, 945-46 (9th Cir. 2004) (holding that BIA abused its discretion in denying as untimely and numerically barred a motion to reopen based on changed circumstances in Egypt); *Azanor v. Ashcroft*, 364 F.3d 1013, 1021-22 (9th Cir. 2004).

“A petitioner's evidence regarding changed circumstances will almost always relate to his initial claim; nothing in the statute or regulations requires otherwise. The critical question is not whether the allegations bear some connection to a prior application, but rather whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution.” *Maly*, 381 F.3d at 945.

The exception for changed country conditions does not apply to changes in United States asylum law. *See Azanor*, 364 F.3d at 1022 (rejecting claim that recognition of female genital mutilation as a ground for asylum constituted changed country conditions within the meaning of 8 C.F.R. § 3.2(c)(3)(ii)).

3. Jointly-Filed Motions

An exception to the number and time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.2(c)(3)(iii); *Bolshakov v. INS*, 133 F.3d 1279, 1281-82 (9th Cir. 1998) (rejecting government’s contention that the “exception in section 3.2(c)(3)(iii) is an administrative remedy that must be exhausted before an alien can petition the Court of Appeals”).

4. Government Motions Based on Fraud

The government may, at any time, bring a motion based on fraud in the original proceeding or a crime that would support termination of asylum. *See* 8 C.F.R. § 1003.2(c)(3)(iv).

5. Movant in Custody

A motion to reopen to rescind an in absentia order of removal may be filed at any time if the applicant demonstrates that he failed to appear at the hearing because he was in state or federal custody. *See* 8 C.F.R. § 1003.2(c)(3) (referring to 8 C.F.R. § 1003.23(b)(4)(ii) *and* (b)(4)(iii)(A)(2)).

6. Sua Sponte Reopening by the BIA

The BIA may at any time reopen proceedings sua sponte. *See* 8 C.F.R. § 1003.2(a). This court lacks jurisdiction to review a claim that the BIA should have exercised its sua sponte power to reopen deportation proceedings. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002).

VI. EQUITABLE TOLLING

The ninety-day/one-motion limitations are not jurisdictional, and are amenable to equitable tolling. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1188 (9th Cir. 2001) (en banc). Equitable tolling is available “when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception,

fraud, or error.” *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003).

A. Circumstances Beyond the Applicant’s Control

In *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc), the court held that equitable tolling is available “in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim,” *id.* at 1193 (internal quotation marks omitted) (applying equitable tolling where INS officer repeatedly provided erroneous information to the applicant). “The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party’s control.” *Id.*

B. Fraudulent or Deceptive Attorney Conduct

This court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent or deceptive conduct. *See, e.g., Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003). “Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client’s case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available.” *Id.* at 898; *see also Singh v. Ashcroft*, 367 F.3d 1182, 1185–86 (9th Cir. 2004); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999); *cf. Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (stating that “[i]neffective assistance of counsel amounting to a due process violation permits untimely reopening,” without discussing fraudulent or deceptive conduct).

“It is well established in this circuit that ineffective assistance of counsel, where a nonattorney engaged in fraudulent activity causes an essential action in his or her client’s case to be undertaken ineffectively, may equitably toll the statute of limitations.” *Fajardo v. INS*, 300 F.3d 1018, 1020 (9th Cir. 2002); *see also Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005) (holding that fraudulent conduct by a non-attorney

warranted equitable tolling of the deadline to file a motion to reopen to seek special rule cancellation); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1179, 1187-88, 1193-96 (9th Cir. 2001).

C. Due Diligence

The filing deadline may be tolled until the petitioner, exercising due diligence, discovers the fraud, deception, or error. In cases involving ineffective assistance, this court has found that the limitation period may be tolled until the petitioner meets with new counsel to discuss his file, thereby becoming aware of the harm resulting from the misconduct of his prior representatives. *See Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003); *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002); *see also Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099-1100 (9th Cir. 2005) (holding in special rule cancellation case that petition acted with due diligence in making a FOIA request for court case file after discovering former counsel's deception).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Presented Through a Motion to Reopen

"Where the facts surrounding allegedly ineffective representation by counsel were unavailable to the petitioner at an earlier stage of the administrative process, motions before the BIA based on claims of ineffective assistance of counsel are properly deemed motions to reopen." *Iturribarria v. INS*, 321 F.3d 889, 891 (9th Cir. 2003) (holding that "the BIA misapplied its own regulations when it classified [petitioner's] motion alleging ineffective assistance of counsel as a motion to reconsider rather than a motion to reopen"); *see also Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004).

B. Standard of Review

"We review findings of fact regarding counsel's performance for substantial evidence." *Lin v. Ashcroft*, 377 F.3d 1014, 1024 (9th Cir. 2004).

C. Requirements for Due Process Violation

1. Constitutional Basis

“[T]he extent to which aliens are entitled to effective assistance of counsel during [immigration] proceedings is governed by the Fifth Amendment due process right to a fair hearing.” *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), *amended by* 404 F.3d 1105 (2005) (emphasis omitted). The Sixth Amendment “reasonableness” standard for IAC in criminal proceedings “does not attach to civil immigration matters.” *Id.* at 974. “Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (internal quotation marks omitted); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857–58 (9th Cir. 2004) (per curiam).

2. Counsel’s Competence

To prevail on an ineffective assistance of counsel claim, the petitioner must make two showings. First, petitioner must demonstrate that counsel failed to perform with sufficient competence. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). “We do not require that [petitioner’s] representation be brilliant, but it cannot serve to make [the] immigration hearing so fundamentally unfair that [petitioner] was prevented from reasonably presenting his case.” *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (internal quotation marks omitted) (holding that counsel’s failure to: investigate and present the factual and legal basis of Lin’s asylum claim; attend the hearing in person; advocate on his behalf at the hearing; and file brief on appeal, constituted IAC).

Cross-reference: Cases Finding Ineffective Assistance, below.

3. Prejudice

Second, petitioner must generally show that she was prejudiced by her counsel’s performance. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th

Cir. 2005). A showing of prejudice can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *Iturribarria*, 321 F.3d at 899–90 (internal quotation marks omitted); see also *Maravilla Maravilla*, 381 F.3d at 858; cf. *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), amended by 404 F.3d 1105 (2005) (stating that alien must show "substantial prejudice, which is essentially a demonstration that the alleged violation affected the outcome of the proceedings") (internal quotation marks omitted).

The court will "consider the underlying merits of the case to come to a tentative conclusion as to whether [petitioner's] claim, if properly presented, would be viable." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004). To show prejudice, the alien "only needs to show that he has *plausible* grounds for relief." *Id.* (internal quotation marks omitted).

a. Exception for In Absentia Orders

Where a claim of ineffective assistance of counsel is the basis for moving to reopen and rescind an in absentia removal order, a showing of prejudice is not required. See *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003); see also *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir.), amended by 339 F.3d 1012 (2003) (granting petition without discussing prejudice).

D. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel generally must meet the three procedural requirements set forth by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The petitioner must "1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, 2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, 3) either show that a complaint against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed." *Iturribarria*, 321 F.3d at 900; see also *Monjaraz-Munoz v. INS*, 327 F.3d 892, 896 n.1 (9th Cir.), amended by 339 F.3d 1012 (2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226–27 (9th Cir. 2002). The court "presume[s], as a general rule, that the Board does not abuse its discretion when it obligates petitioners to satisfy *Lozada*'s literal requirements." *Reyes*

v. Ashcroft, 358 F.3d 592, 597 (9th Cir. 2004).

1. Exceptions

The failure to comply with the *Lozada* requirements is not fatal where the alleged ineffective assistance is plain on the face of the administrative record. See *Castillo-Perez v. INS*, 212 F.3d 518, 525–26 (9th Cir. 2000). “In addition, we have concluded that ‘arbitrary application’ of the *Lozada* command is not warranted if petitioner shows ‘diligent efforts’ to comply were unsuccessful due to factors beyond petitioner’s control.” *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004).

See also *Lo v. Ashcroft*, 341 F.3d 934, 937–38 (9th Cir. 2003) (noting court’s flexibility in applying the *Lozada* requirements, and holding that failure to comply with third *Lozada* factor did not defeat IAC claim given no suggestion of collusion between petitioners and counsel); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 825–26 (9th Cir. 2003) (failure to file bar complaint not fatal); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (substantial compliance sufficient); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124–25 (9th Cir. 2000) (holding that the BIA may not impose the *Lozada* requirements arbitrarily); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.), amended by 213 F.3d 1221 (9th Cir. 2000); *Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000).

E. Cases Discussing Ineffective Assistance of Counsel

1. Cases Finding Ineffective Assistance

Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005) (holding that first counsel’s performance was ineffective because she failed to present evidence of petitioner’s past female genital mutilation, and this omission prejudiced her case); *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (failure to file motion to reopen to pursue claim under the Convention Against Torture constituted constitutionally deficient performance); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (counsel’s failure to: investigate and present the factual and legal basis of Lin’s asylum claim; attend the hearing in person; advocate on his behalf at the hearing; and file brief on

appeal, constituted IAC); *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004) (“Failing to file a timely notice of appeal is obvious ineffective assistance of counsel.”); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (counsel’s failure to file brief to BIA established IAC, and caused prejudice); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (failure to file brief on appeal to BIA constitutes ineffective assistance, but affirming the denial of habeas because petitioner could not show prejudice); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir.) (holding that ineffective assistance of counsel constitutes exceptional circumstances warranting reopening), *amended by* 339 F.3d 1012 (2003); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (holding that petitioner’s counsel was ineffective, but affirming the denial of the motion to reopen because petitioner could not show prejudice); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (finding that petitioners established ineffective assistance); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) (untimely petition for review presented valid ineffective assistance claim); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (finding a “clear and obvious case of ineffective assistance of counsel” where counsel “failed, without any reason, to timely file [an] application” for suspension where petitioner was prima facie eligible for relief); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.) (holding that the IJ denied applicant her statutory right to counsel when he allowed an attorney whom she had never met and who had no understanding of her case to represent her), *amended by* 213 F.3d 1221 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (holding that fraudulent legal representation by notary posing as an attorney established a meritorious IAC claim).

2. Cases Rejecting IAC Claims

Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004), *amended by* 404 F.3d 1105 (2005) (counsel’s “unfortunate immigration-law advice” was not IAC because it did not “pertain to the actual substance of the hearing” or “call the hearing’s fairness into question”); *Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (rejecting IAC claim because petitioner failed to comply with *Lozada*, and IAC did not prejudice her case because petitioner failed to inform counsel of critical facts); *Reyes v. Ashcroft*, 358 F.3d 592, 597–98 (9th Cir. 2004) (rejecting IAC claim because petitioner failed to substantially comply with *Lozada*); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (rejecting IAC claim based on single statement of

counsel during proceedings); *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000) (finding that petitioner failed to show prejudice); *Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999) (finding that petitioner failed to show prejudice); *Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986) (finding no ineffective assistance by accredited representative); *Ramirez-Durazo v. INS*, 794 F.2d 491, 500–01 (9th Cir. 1986) (no IAC or prejudice); *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986) (holding that attorney’s decision to forego contesting deportability was a tactical decision that did not rise to the level of ineffective assistance of counsel).

VIII. CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF

A. Motions to Reopen to Apply for Suspension

INS v. Rios-Pineda, 471 U.S. 444 (1985) (petition denied); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (petition denied).

Chete Juarez v. Ashcroft, 376 F.3d 944 (9th Cir. 2004) (petition granted); *Ordonez v. INS*, 345 F.3d 777 (9th Cir. 2003) (petition granted); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (petition denied); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because “new” information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (reversed and remanded); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (reversed and remanded); *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (petition denied); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (petition remanded); *Sequeira-Solano v. INS*, 104 F.3d 278 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986) (en banc) (holding that discretionary denial of reopening was arbitrary); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985), *amended by* 785 F.2d 650 (9th Cir. 1986) (reversed and remanded); *Duran v. INS*, 756 F.2d 1338 (9th Cir. 1985) (reversed and remanded on suspension claim).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Section 212(c) Relief.

B. Motions to Reopen to Apply for Asylum and Withholding

INS v. Doherty, 502 U.S. 314 (1992) (holding that the Attorney General did not abuse his discretion by denying the motion to reopen); *INS v. Abudu*, 485 U.S. 94 (1988) (holding that the BIA did not abuse its discretion by denying the motion to reopen).

Bhasin v. Gonzales, No. 03-73481, 2005 WL 2100447, at *7 (9th Cir. Sept. 1, 2005) (petition granted); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (petition granted); *Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004) (petition granted); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (petition granted); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004) (petition granted); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (petition granted); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (denying petition as to asylum and withholding, granting as to CAT relief); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (petition granted); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (granting petition for review of BIA's denial of motion to reconsider based on due process violation); *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (petition granted); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (petition denied); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (petition denied); *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) (petition denied); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (petition granted); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984) (petition denied); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (reversed and remanded); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (reversed and remanded); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (reversed and remanded); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (reversed and remanded); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (remanding on asylum claim); *Sangabi v. INS*, 763 F.2d 374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992 (9th Cir. 1983) (remanded).

Cross-reference: Asylum, Withholding and the Convention Against Torture.

C. Motions to Reopen to Apply for Relief Under the Convention Against Torture

“Denial of a motion to reopen to present a claim under the Convention qualifies as a final order of removal” over which this court has jurisdiction. *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (petition granted).

See also Huang v. Ashcroft, 390 F.3d 1118 (9th Cir. 2004), *as amended* (Jan. 31, 2005) (holding that motions to reopen to apply for withholding or deferral of removal under CAT are both subject to the time limitations set forth in 8 C.F.R. § 208.18(b)(2)); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (granting petition as to CAT relief and remanding for evaluation under correct legal standard); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (holding that IJ abused his discretion in failing to address motion to reopen to apply for CAT relief); *Abassi v. INS*, 305 F.3d 1028 (9th Cir. 2002) (petition granted in part); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) (vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (motion to remand denied); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (motion to reopen to apply for Convention relief denied).

Cross-reference: Asylum, Withholding and the Convention Against Torture.

D. Motions to Reopen to Apply for Adjustment of Status

Medina-Morales v. Ashcroft, 371 F.3d 520 (9th Cir. 2004) (petition granted, holding that BIA erred in considering the strength of the stepparent-stepchild relationship); *De Martinez v. Ashcroft*, 374 F.3d 759 (9th Cir. 2004) (petition denied); *Manjiyani v. Ashcroft*, 343 F.3d 1018 (9th Cir. 2003) (order) (petition remanded); *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (affirming BIA’s denial of motion to remand to apply for adjustment of status based on marriage that occurred during deportation proceedings); *Zazueta-Carrillo v. INS*, 322 F.3d 1166 (9th Cir. 2003) (remanding BIA’s

denial of motion to reopen to apply for adjustment of status based on petitioner's failure to depart voluntarily within the time given by the BIA); *Castillo Ison v. INS*, 308 F.3d 1036 (9th Cir. 2002) (per curiam) (adjustment of status and immigrant visa; petition granted); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (holding that the court lacked jurisdiction to review the BIA's refusal to sua sponte reopen proceedings to allow applicant to apply for adjustment of status); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (reversing and remanding denial of motion to remand to adjust status); *Eide-Kahayon v. INS*, 86 F.3d 147 (9th Cir. 1996) (per curiam) (petition denied); *Caruncho v. INS*, 68 F.3d 356 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851 (9th Cir. 1994) (petition denied); *Ng v. INS*, 804 F.2d 534 (9th Cir. 1986) (reversed and remanded); *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (petition granted); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Ahwazi v. INS*, 751 F.2d 1120 (9th Cir. 1985) (petitions denied).

E. Motions to Reopen to Apply for Other Relief

Albillo-De Leon v. Gonzales, 410 F.3d 1090 (9th Cir. 2005) (NACARA section 203(c) special rule cancellation; petition granted); *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002) (holding that petitioner failed to exhaust equitable tolling argument); *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (Section 241(f) waiver; petition granted); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (holding that the court lacks jurisdiction to review denial of aggravated felon's motion to reopen to apply for former § 212(c) relief); *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver; petition denied); *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995) (waiver of deportation; remanded); *Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995) (former § 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (former § 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987) (former § 212(c) relief; petition denied); *Platero-Reymundo v. INS*, 807 F.2d 865 (9th Cir. 1987) (voluntary departure; petition denied); *Desting-Estime v. INS*, 804 F.2d 1439 (9th Cir. 1986) (to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986) (reinstatement of voluntary departure; finding no abuse of discretion); *Mattis v. INS*, 774 F.2d

965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Avila-Murrieta v. INS*, 762 F.2d 733 (9th Cir. 1985) (former § 212(c) relief; petition denied).